

**DECISION**



12702 *Proc I Petition*  
**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

FILE: B-196076

DATE: February 1, 1980

MATTER OF: Otis Elevator Company

**DIGEST:**

1. Large business protest against size standard used in small business clause of solicitation is dismissed because contracting officer's determination as to applicable size standard is final unless appealed to SBA Size Appeals Board.
2. Protest against total small business set-aside is denied; contracting officer did not abuse his discretion in determining, pursuant to FPR § 1-1.706-5(a)(2), that there was reasonable expectation that bids would be obtained from sufficient number of responsible small business concerns at reasonable prices.

CNG 00790

Otis Elevator Company (Otis) protests the Veterans Administration (VA) solicitation of elevator and dumb-waiter maintenance services for fiscal year 1980 for the VA Medical Center at Nashville, Tennessee, under invitation for bids (IFB) No. 626-93-79, issued as a total small business set-aside, asserting that the agency's maintenance requirements should be resolicited on an unrestricted basis. For the reasons that follow, we find no legal basis to object to the VA's set-aside determination and award. *AGCO/460*

The protester contends that contrary to Federal Procurement Regulations (FPR) § 1-1.706-5(a)(2) (1964 ed. amend. 192), the VA had no reasonable expectation at the time the IFB was issued that it would receive sufficient bids from responsible small business firms so that award could be made at a reasonable price, and that the set-aside determination therefore constitutes an abuse of discretion. Otis states that the contracting officer should have considered the type of equipment,

*008515 111431*  
[Protest Involving Set-Aside DETERMINATION]

the nature of the facilities, and the safety, reliability and dependability cost risks posed by an award to a small business concern in determining whether to set aside the procurement. The protester insists that because Otis engineered, manufactured and installed the equipment to be serviced under the contract it can perform the best maintenance work and that it is neither equitable nor in the Government's best interests to discriminate against a responsible firm simply because it is not a small business.

2 Otis also asserts that the small business size standard (500 or less employees) used in the IFB was not in accordance with that prescribed by the Small Business Administration (SBA), 13 C.F.R. § 121.3-8(e) (1979). See FPR § 1-1.701-1(f) (1964 ed. amend. 162); Veterans Administration Procurement Regulations (VAPR) § 8-1.704-4(a) (1979). The procurement, in Otis' opinion, is one for maintenance services, requiring a size standard based on the firm's annual receipts, rather than the number of employees--the latter standard is to be used only if no other size standard is provided in 13 C.F.R. § 121.3-8 (1979). Although Otis contends that the VA should correct the size standard used in the IFB, it has protested the allegedly improper standard as evidence that the contracting officer lacked the requisite expectation of adequate, reasonably priced bids at the time the IFB was issued.

To the extent Otis questions the propriety of the size standard used in the IFB, the protest is dismissed. The contracting officer's determination as to the applicable size standard is final unless it is appealed to the SBA Size Appeals Board in the manner prescribed in 13 C.F.R. § 121.3-6. 13 C.F.R. § 121.3-8 (1979).

Contrary to the protester's opinion, FPR § 1-1.706-1(c) requires that a set-aside be effected when the contracting officer determines it to be in the interest of assuring that a fair proportion of Government procurement is placed with small business concerns. For a total set-aside FPR § 1-1.706-5(a)(2) requires that there must be a reasonable expectation that bids will be obtained from a sufficient number of concerns so that awards will be made at reasonable prices

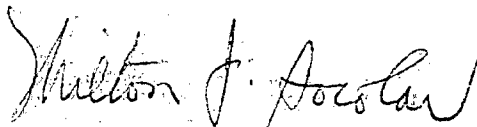
and provides that although past procurement history is important, it is not the only controlling factor which should be considered in determining whether a reasonable expectation exists. The regulation does not, however, specify other factors for consideration.

A determination under FPR § 1-1.706(a)(2) concerning whether adequate competition may reasonably be expected is basically a business judgment within the broad discretion of the contracting officer for which we will not substitute our judgment, and we will sustain a determination under the regulation absent a clear showing of abuse of such discretion. Otis Elevator Company, B-194147, May 10, 1979, 79-1 CPD 331; Simpson Electric Company, B-190320, February 15, 1978, 78-1 CPD 129.

CNGO 1495- The VA states that it solicited bids from 18 small business firms and received bids from Capitol City Elevator Company (Capitol) and United States Crane Certification Bureau, Inc., of \$1,340 and \$2,786.33 per month, respectively. The contracting officer determined that Capitol was a responsible prospective contractor and that its bid price was reasonable based on a comparison with the other bid received, the Government estimate and contract prices for the previous 2 fiscal years. See FPR §§ 1-2.407-2 (1964 ed. amend. 95) and 1-3.807-2(b) (1964 ed. amend. 194). Award was made to Capitol on the basis of the agency's urgent need for the maintenance services, notwithstanding Otis' protest, pursuant to VAPR § 8-2.407-8(b) (1979).

Although Otis contends that the bid opening results are irrelevant to the propriety of the contracting officer's set-aside determination, we consider the VA's procurement history concerning the number of small businesses interested in providing these services, as well as the fact that two bids were received from small business firms, an indication that the contracting officer's expectation of adequate competition was reasonable. See, Otis Elevator Company, B-195831, November 8, 1979, 79-2 CPD 341; Simpson Electric Company, *supra*. Similarly, the contracting officer's determination that Capitol's bid price was reasonable in comparison to the Government estimate and prior contracts indicates that sufficient competition was received to ensure award at a reasonable price.

Our review of the record does not indicate that the contracting officer abused his discretion in restricting the procurement to small business concerns, and Otis' protest against the set-aside determination is denied.

A handwritten signature in dark ink, appearing to read "Milton J. Fowler". The signature is written in a cursive style with a large, sweeping initial "M".

For The Comptroller General  
of the United States